

Mandica (Migration) [2017] AATA 2256 (10 November 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Antonietta Mandica

VISA APPLICANT: Mr Raafat Elhassanen Mohamed Mohamed

CASE NUMBER: 1618409

DIBP REFERENCE(S): OSF2016030428

MEMBER: Peter Emmerton

DATE: 10 November 2017

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the
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- Statement made on 10 November 2017 at 2:39pm

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CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Genuine spousal relationship – Financial resource sharing – Plans for future financial resource sharing – Socialisation - Substantial personal knowledge – Limited physical interaction – Relationship began online

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cl 309.211, cl 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 September 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant, Mr Mohamed Raafat Elhassanen MOHAMED applied for the visa on 27 June 2016 on the basis of his relationship with his sponsor, Ms Antoinietta MANDICA the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied that the couple were in a genuine spousal relationship.
4. The review applicant appeared before the Tribunal on 9 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence via telephone from the visa applicant and his brother, Mr Hisham MOHAMED. The review applicant was represented in relation to the review by her registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by section 5F of the Act.
7. In determining the applicants' claims the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing-, the Tribunal is aware of the need and importance of being sensitive to the circumstances and the difficulties applicants often face before the Tribunal in their particular circumstances.
8. The applicants rely on the evidence given before the Tribunal together with written submissions and supporting evidence provided to the Tribunal and previously to the Department

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The delegate accepted that the couple were legally married in a marriage that is valid for the purposes of the Act. The Tribunal also accepts the Marriage Certificate presented is valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. In forming an opinion whether they are in a spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
13. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 27 June 2016 on the grounds of being in a spousal relationship with an Australian citizen,
14. In March 2013 an online friendship started between the couple and in May 2013 the relationship started to become closer.
15. The sponsor and her two teenage children, moved in with her mother in January 2014. She started her divorce process in January 2015 and it is claimed that the friendship turned into a relationship in February 2015. It is also claimed that this is the time at which the couple started a committed shared life together, to the exclusion of all others. This is when they decided to start telling their family members about their relationship.
16. The couple started talking about getting married in August 2015, around the same time the Final Divorce decision is granted to the sponsor, from her previous marriage.
17. The sponsor travelled to Egypt and met the visa applicant in person, in Hurghada, Egypt, for the first time on 20 September 2015 and returned to Australia on 5 October 2015.
18. The sponsor again flew to Egypt and got married to the visa applicant, in a civil ceremony, departing Australia on 12 January 2016 and returning on 25 January 2016. The visa applicant's brother was not present due to his compulsory deployment in the military. The visa applicant's widowed mother and his sister were not present at the wedding, as they were at the time and are still, unaware of the marriage. The couple believe that they will not approve due to their traditional beliefs with concerns about the age difference, differing religious beliefs, nationalities of the couple and the divorce status of the sponsor. They intend addressing this issue once the couple are living together as spouses in Australia.
19. The Sponsor returned to Egypt for a third time to be with her husband on 17 April 2017 and returned to Adelaide on 29 April 2017.

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21. The Tribunal has considered the documentary evidence provided to the Department and the Tribunal. The Tribunal has had the benefit of taking oral evidence from the sponsor at the hearing as well as oral evidence via telephone from the visa applicant and his brother, Mr Hisham MOHAMED. The Tribunal found all those presenting evidence to be credible, genuine and persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal notes that in the time following the delegate's decision, the couple has had the opportunity to amass more evidence in support of their case, than was originally provided to the delegate. The Tribunal has considered all aspects of the relationship.
22. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that this element of a spousal relationship was proved, as no financial evidence was presented. The Tribunal is satisfied that the sharing of the costs associated with the three trips made by the sponsor, in order to be with the visa applicant, indicates some financial resource sharing.
23. The Tribunal also notes that both the parties live with their mothers and are financially independent. Plans have been discussed regarding the sale of a house in Cairo, owned by the visa applicant, to assist him to establish himself with his wife in Adelaide. It was apparent to the tribunal that financial planning discussions had taken place between the parties including such topics as work and purchase of a house near the sponsor's aging mother. The Tribunal places substantial weight on this evidence.
24. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The Tribunal notes that the couple have had only one brief period of co-habitation following their wedding. This is in-line with Muslim Egyptian customs. A married couple must present a marriage certificate in order to share a room in a hotel or rent an apartment together. Whilst the delegate was concerned by the fact that the couple had not shared accommodation prior to the most recent trip, the Tribunal is satisfied as to the appropriateness of living apart until a marriage certificate could be produced.
25. Both parties appeared to have substantial knowledge of each-other's work, and living arrangements. The sponsor was able to state the size of the visa applicant's soccer boots. Evidence was presented that demonstrates the ongoing communication between the couple. It was also demonstrated to the Tribunal that both parties have bought gifts for each-others family members.
26. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family. The delegate was not satisfied that the couple had demonstrated a sufficient level of socialisation. They expressed concerns associated with a civil marriage ceremony with the non-attendance of the visa applicant's immediate family. The Tribunal was satisfied that the couple and the brother of the visa applicant provided consistent accounts of the conservative nature of the visa applicant's mother and sister. They also detailed the initial rejection they anticipate will occur as a result of the couple's age difference, cultural backgrounds, previous marital status and religious beliefs, when they reveal the true status of the relationship and the marriage.
27. The visa applicant's brother provided a written statement to the Tribunal as well as providing oral evidence. The correlation between the information supplied by all three parties lead the Tribunal to be satisfied that substantial consideration had been given to how best manage the more conservative family members. Evidence was also provided stating that only close

friends of the visa applicant were aware of the marriage for fear of disclosure. A substantial amount of information was provided that left the Tribunal confident that the sponsor's family were both aware of and supportive of the marriage. The Tribunal places substantial weight on this evidence.

28. The Tribunal notes that the delegate was mistakenly of the view that the visa applicant had been married and divorced. The Tribunal found no evidence of this. The sponsor had been married and divorced as previously stated and has two teenage sons from that marriage.
29. The Tribunal notes that public displays of affection between couples are not customary in Egypt. The sponsor showed a sophisticated understanding of cultural mores in areas of dress, security and independent travel undertaken by women. Evidence of communications between the couple showed a discussion about their variance in religious belief systems that appeared to demonstrate a substantial degree of tolerance and maturity. The Tribunal views this as evidence that the sponsor has invested time and effort into understanding and showing respect for her husband and his culture.
30. The delegate was concerned that the photographic evidence primarily focussed on the couple or with a limited number of friends or relatives. As previously mentioned the sponsor and the visa applicant were attempting to behave discreetly in Egypt to avoid confrontation with the visa applicant's mother and sister. They were also in effect on their honeymoon during the most recent trip. For both the reasons stated above the Tribunal is satisfied that the limited socialising is understandable. The Tribunal places substantial weight on the evidence presented to support the social aspects of the relationship.
31. When assessing the nature of the persons' commitment to each other the Tribunal has considered the relationship development, how long they have lived together and whether the relationship is viewed by them as long term. The delegate was not satisfied that the nature of the commitment was genuine. This was in part due to the commencement of the relationship on "Facebook" and the decision to marry, prior to meeting with a subsequent civil service wedding on the second trip. Both parties explained that they had been communicating for over two years developing a mutual understanding and relationship prior to meeting in person.
32. The first meeting was to assure themselves and each other that the relationship was genuine and meaningful. They were not able to marry at this point as Egyptian law required the sponsor to have been divorced for a minimum of three months prior to a wedding taking place. Both parties were aware of this at the time.
33. The second meeting, during which the marriage took place, concluded without the couple cohabiting as they needed to wait for the appropriate certificate, in order to be permitted to share accommodation.
34. On the third trip the couple shared an apartment and hotel accommodation as a married couple are permitted.
35. The Tribunal notes that the relationship has been continuing for approximately five years via the internet and in person and that the couple have persevered in spite of the familial, immigration and cultural barriers. The supportive declarations provided by the sponsor's mother, son, doctor and friends in conjunction with the oral evidence and written statement by the visa applicant's brother, satisfy the Tribunal that the commitment is well known by family and friends with the exception of the visa applicant's mother and sister, for reasons already set out and is perceived as genuine. The Tribunal places substantial weight on this aspect.

36. For the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the review applicant were in a genuine and continuing relationship, and had a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.
37. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
38. Therefore the visa applicant meets cl.309.211 and cl.309.221.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309.211 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).